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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAUL S. ZAVALA,

Defendant.

CR-05-105-LRS

United States' Memorandum in
Support of Motion in Limine:
Punishment/Mistrial/Discovery

Plaintiff, United States of America, by and through James A. McDevitt,
United States Attorney for the Eastern District of Washington, and Aine Ahmed,
Assistant United States Attorney for the Eastern District of Washington,
respectfully submits the following memorandum in support of its Motion in
Limine.

Punishment:

The United States first moves that the Defendant and any other witness be
barred from discussing before the jury any possible term of imprisonment that the
Defendant may face if convicted.

The jury has no sentencing function and should reach its verdict without
regard to what sentence might be imposed. Rogers v. United States, 422 U.S. 35,
40 (1975). In United States v. Wilson, 506 F.2d 521 (9th Cir. 1974), the defendant
argued that, since he faced a statutorily imposed sentence, the trial judge should

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1 not have instructed the jury that punishment was exclusively a matter for the court.
2 The Ninth Circuit held that a jury's role is to determine guilt, the court's role,
3 among many others, is to impose sentence. As the Ninth Circuit explained,
4 "[e]ven if the statutory sentence were mandatory, it is still the exclusive province
5 of the court to pronounce it." Id. at 522.

6 The function of the jury is to decide the question of guilt or innocence. This
7 determination should be made solely on the evidence and without regard to the
8 possible consequences of the determination. Therefore, knowledge of a
9 mandatory minimum sentence or any other possible sentence should not enter into
10 the jury's deliberation and the jury should receive no information from counsel, the
11 Defendant or Defendant's witnesses as to potential sentencing.

12 **Mistrial:**

13 The United States moves that the Court mandate that all Motions for
14 Mistrial be moved for and presented outside the presence of the jury. Such
15 motions may be highly prejudicial to the non-moving party, and often lead to
16 speaking objections.

17 **Financial Ability:**

18 The United States moves that the Court order that the Defense Counsel
19 make no reference to the financial ability or to the overall resources of the United
20 States to investigate and/or prosecute this case.

21 **Discovery:**

22 That all parties be instructed not to make demands or requests *in the*
23 *presence of the jury* for matters found or contained in opposing counsel's file,
24 which would include statements, pleadings, photographs, and other documents,
25 nor demand or request a mid-trial document examination, nor ask the other party's
26 witness to conduct any demonstration, or any other unusual requests during the
27

1 course of the trial *without first* approaching opposing counsel, then the bench
2 and/or by making such request in chambers, e.g. "I have never seen that exhibit"
3 or "I never received that document in discovery" - such statements being made
4 before the jury. Of note, the Government has previously invited Defense Counsel
5 to review its documents to ensure that the Defendant has all discovery.

6 **Witnesses:**

7 The United States moves that counsel be instructed not to tender, read from,
8 or refer to any ex parte statement or report of any person not then and there present
9 in Court to testify and to be cross-examined by counsel for the Plaintiff, and that
10 counsel be instructed not to suggest to the jury by argument or otherwise what
11 would have been the testimony of any witness not actually called. McClanahan v.
12 United States, 230 F.2d 919, 925 (1956).

13 **Expert Testimony:**

14 The United States moves that the Court exclude any expert testimony based
15 upon speculation or conjecture. "The adjective 'scientific' implies a grounding in
16 the methods and procedures of science. Similarly, the word 'knowledge' connotes
17 more than subjective belief or unsupported speculation." Daubert v. Merrell Dow
18 Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993). Expert testimony must be based
19 upon facts and not speculation. Furthermore, speculative questions and answers
20 concerning possible cause damage causing event (i.e., "fire") without competently
21 showing *probability*, or speculating about *possible causes* are improper and
22 inadmissible. Rule 702 requires that expert testimony relate to scientific, technical,
23 or other specialized knowledge, which does not include unsupported speculation
24 and subjective beliefs." Guidroz-Brault v. Missouri Pacific Railroad Co., 254 F.3d
25 825, 829 (2001) (expert opinion related to the cause of the accident was
26
27
28

1 inadmissible where it was not supported by the facts and was based on speculation
2 and conjecture).

3
4 DATED January 12, 2006.

5 James A. McDevitt
6 United States Attorney

7 *s/Aine Ahmed*

8 Aine Ahmed
9 Assistant United States Attorney

10 I hereby certify that on January 12, 2006, I electronically filed the foregoing
11 with the Clerk of the Court using the CM/ECF System which will send
12 notification of such filing to the following, and/or I hereby certify that I have
13 mailed by United States Postal Service the document to the following non-
14 CM/ECF participant(s):

15 Mr. Frank L. Cikutovich
16 Stiley & Cikutovich, PLLC
17 1408 W. Broadway
18 Spokane, Washington 99201

19 *s/Aine Ahmed*

20 Aine Ahmed
21 Assistant United States Attorney